

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

1. Article 41 governs the seller's duty to ensure that the goods it delivers are not subject to rights or claims by a third party. Freedom from such rights or claims permits the buyer to enjoy undisturbed possession and ownership of the goods. Under article 4 (b) of the Convention, questions concerning "the effect which the contract may have on the property in the goods sold" are beyond the scope of the CISG.¹ Article 41, however, makes it clear that the seller's obligation to give the buyer clear property rights in the goods—so that the buyer is free from third party rights or claims—is a matter governed by the Convention: the seller will be in breach of its duties under the Convention if it does not meet the requirements imposed by article 41. The basic statement of the seller's obligation is found in the first sentence of article 41: the seller must deliver goods that "are free from any right or claim of a third party . . ." This obligation has been considered in situations in which the buyer was deprived of possession of the goods.² The protection in article 41 against "any . . . claim of a third party" has been interpreted, "[a]ccording to its meaning and purpose . . . to protect the buyer from the very outset from having to deal with any third party claims concerning the purchased item, the justification of which he cannot immediately check, although [w]hether this also applies to claims pulled out of thin air is disputed."³ An exception to the article 41 obligation arises, however, if the buyer "agreed to take the goods subject to that right or claim". In addition, it has been stated that, under article 6, the parties may agree more generally to derogate from the obligations of article 41.⁴ The second sentence of article 41 mandates a distinction between third party rights or claims based on "industrial or other intellectual property" and other rights or claims of third parties. Only the latter are within the scope of article 41, whereas the former are governed by article 42 of the Convention.

APPLICATION OF ARTICLE 41

2. There have been relatively few decisions applying article 41; they have tended to focus on what constitutes a breach of the seller's obligations under the provision, and

on derogation from the provision. In one decision, the court stated that a seller would violate article 41 if it delivered goods subject to a restriction, imposed by the seller's own supplier, on the countries in which the buyer could resell the goods, unless the buyer had previously consented to the restriction.⁵ In another, an arbitration panel indicated that article 41 required a seller to arrange for its wholly-owned subsidiary, which had obtained a court order putting under arrest the vessel in which the goods were loaded, to avoid or lift the effects of the order.⁶ Where the delivered goods (an automobile) were seized from the buyer as stolen goods, the court indicated that article 41 would have been violated had the parties not agreed to exclude the obligations in article 41 and had the statute of limitations applicable to the article 41 claim not expired before the claim was filed; the court found, however, that the delivery of stolen goods also violated article 30 CISG (which provides that the seller must "transfer the property in the goods, as required by the contract"), and that the article 30 obligation was neither excluded by the parties' agreement nor barred by the applicable statute of limitations.⁷ In another decision, the court held that the seller of an automobile that was confiscated from the buyer as a stolen vehicle had violated its obligation under both article 41 and 30; a contractual disclaimer of liability, the court held, had not become part of the parties' contract, and even if it had, would not have eliminated the seller's obligation under article 30 to transfer ownership of the goods.⁸ Where the goods were seized from the buyer because of violations of import regulations, on the other hand, the court found that neither article 41 nor article 30 CISG had not been violated because the buyer was aware of the situation concerning the import regulations when it purchased the goods, and thus the buyer had agreed to "take the goods subject to that right or claim."⁹ Where the buyer, at the time the contract was concluded, was not made aware of violations of import regulations that led to the confiscations of the goods, however, the seller was held to have violated article 41.¹⁰ Another buyer from whom goods (an automobile) had been confiscated lost its rights under article 41 because it failed to give timely notice of the third party's right or claim as required by article 43 CISG.¹¹

Notes

¹ See Landgericht Freiburg, Germany, 22 August 2002, English translation available on the Internet at www.cisg.law.pace.edu (holding that domestic law governed the question of whether the seller had transferred title to the seller pursuant to a contract governed by CISG).

² CLOUT case No. 1235 [Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006]; Landgericht Freiburg, Germany,

22 August 2002, English translation available on the Internet at www.cisg.law.pace.edu; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 21 January 1998, English translation available on the Internet at www.cisg.law.pace.edu; Federal Arbitration Court for the Western Siberia Circuit, Russian Federation, 6 August 2002, English translation available on the Internet at www.cisg.law.pace.edu.

³ CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006] (see full text of the decision).

⁴ CLOUT case No. 1235 [Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007], English translation available on the Internet at www.cisg.law.pace.edu; Landgericht Freiburg, Germany, 22 August 2002, English translation available on the Internet at www.cisg.law.pace.edu.

⁵ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision).

⁶ Arbitration Court of the International Chamber of Commerce, 1995 (Arbitral award No. 8204), Unilex.

⁷ CLOUT case No. 1235 [Oberlandesgericht Dresden, Germany, 21 March 2007 and 18 January 2007], English translation available on the Internet at www.cisg.law.pace.edu.

⁸ Landgericht Freiburg, Germany, 22 August 2002, English translation available on the Internet at www.cisg.law.pace.edu.

⁹ Federal Arbitration Court for the Western Siberia Circuit, Russian Federation, 6 August 2002, English translation available on the Internet at www.cisg.law.pace.edu.

¹⁰ Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 21 January 1998, English translation available on the Internet at www.cisg.law.pace.edu.

¹¹ CLOUT case No. 822 [Bundesgerichtshof, Germany, 11 January 2006].